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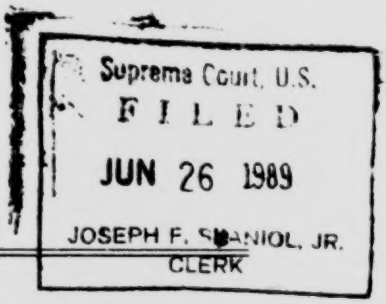

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

EDWARD MERRILL, JOSEPH DE HOPE, VIRGINIA JOURIS, ROBERT ARRIGONI, HAROLD ZUCKERMAN, ALLAN J. PETERSDORF, JAMES COZENS,
Petitioners,

VS.

BOYER AUGUST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether a public school employer must accept as constitutionally protected conduct, an employee's repeated criticism of and calling his immediate supervisor "incompetent", both in public and private.

2. Whether a public school employer must accept as constitutionally protected conduct, a lower management member's refusal to support, and his work to undermine, a final decision of his superior.

3. Whether a public school employer must accept as protected conduct, a course of insults and bickering between a member of lower management and his immediate subordinates.

4. Whether a public school employer must accept as protected conduct, the conduct of a member of lower management whose basic approach and philosophy regarding his job differs from the public school employer's view.

5. Whether a public school employer must accept as protected conduct, the conduct of a school administrator in charge of student attendance and discipline who advocates during school time that students walk out of an assembly.

6. Whether a public school employer must accept as protected conduct, a school district administrator's misrepresentations of District policy in public.

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VS.

BOYER AUGUST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners Edward Merrill, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California, entered in this proceeding on March 29, 1989.

OPINION BELOW

The Supreme Court of the State of California did not render an opinion but denied a petition for review. The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeal of California was entered on December 31, 1988, affirming the judgment against petitioners. The Court of Appeal denied a timely petition for rehearing on January 20, 1989. Thereafter, on March 29, 1989, the Supreme Court of California denied a petition for review. The jurisdiction of this Court is invoked under 28 United States Code section 1257(a). A Federal question is raised in this case by claim under 42 United States Code section 1983 and the First Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION AND STATUTES INVOKED

The United States Constitution, Amendment I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 United States Code section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. INTRODUCTION

This case involves the demotion of plaintiff Boyer August, a public school teacher, from his administrative position as a high school dean of boys back to a position as classroom teacher.

August's primary assignment as Dean was to implement student discipline. August had a different view of his job function. He functioned as an "ombudsman", acting as an advocate for students against teachers and the administration. He believed in open confrontation, accusing his principal and teachers at the school of incompetency, unethical conduct, etc.

August's attitude and confrontational style led to destruction of his working relationship with the staff. In addition, severe arguments between August and his principal led to a paralysis of leadership at the high school. As a result, August was demoted in March 1975. At the same time, the principal resigned his position. August also wrote two letters to the newspaper and confronted a Board member at a public meeting in his usual confrontational style.

August sued the individual school board members and administrators under 42 United States Code, section 1983, contending that his reassignment was due to his outspokenness. The trial court, making findings of law, declared much of August's abrasive conduct to be protected, including public and private attacks on his immediate supervisor. Since the school district admitted part of the rationale for demotion included August calling his principal "incompetent", the jury verdict finding retaliation was virtually mandated.

The Court of Appeal ruled that while August's conduct at times constituted "poor judgment" and "exceeded the bounds of reasonable dissent", the trial court's rulings of law on protected conduct were upheld.

B. BACKGROUND OF THE CASE

August was dean of boys at San Ramon High School which had between 1500-1700 students (RT 1295:22-23).[1] The administration consisted of the principal (Cozens) and two deans. The deans were responsible for student discipline and attendance (RT 1446:10-14).

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[1] RT 1295:22-23 refers to page 1295, lines 22-23 of the Reporter's Transcript of the trial in this matter, currently with the record in the California Courts.

A primary responsibility of the Dean was to handle student referrals from teachers for "cutting" classes or student misbehavior (RT 628:2-24). August came to his job with a different philosophy, attempting to be the friend of misbehaving or truant students instead of correcting misbehavior (RT 300:14-301:13).

When students were charged with misbehavior, August acted as an advocate for student rights, even taking on the stance of a criminal defense attorney (RT 558:1-16). Teachers often felt themselves on trial as August conducted investigations into their competency and curriculum which he often considered to be the cause of the referred student misbehavior. According to one teacher called as a witness by August, there was "the aura of evidence gathering of a kind of courtroom process" (RT 475:20-22). The teaching staff in general felt August took the student's side and seldom implemented discipline (RT 312:12-19, 453:3-16, 472:13-23).

In December 1971, August granted "Christmas clemency" to all boys who had been cutting classes. This was done against the direct order of his principal (RT 987:13-988:14). The trial court declared this insubordination unprotected.

A conflict arose between Cozens and August concerning August's job responsibilities. As a dean, August had no assigned job responsibilities for teacher evaluation, classroom curriculum or grading: those were the responsibility of the principal, vice principal (when such a position was created in 1973) and department heads. However, August often conducted investigations of teacher competency and curriculum as a result of student discipline referrals (RT 1512:23-28). Cozens repeatedly ordered August that:

> he was not to be involved with the curriculum of the teacher in the classroom nor the method of the classroom program nor supervision of students' curriculum and classroom instruction as it existed. (RT 1303:14-17)

August continued to respond that the quality of the teachers' performance affected student discipline (RT 1074:7-21). Contrary to the District's interpretation and orders, August claimed that because the term "student welfare" was in his job descrip-

tion, anything affecting students was his jurisdiction (RT 1076:22-25). This attitude led to uproar among the teachers and arguments with his supervisor (RT 1472:11-26; 1666:15-18).

August has stated that, as Dean of Boys, "he is an ombudsman position. He represents students . . ." (RT 1103:25-27). August felt himself an advocate for the students. The common perception throughout the teaching staff was that students referred to August for discipline were usually not disciplined, and, in fact, August represented the student *against* the staff. Every teacher called as a witness, including those called by August, agreed that this was the staff perception of August (RT 312:4-19, 453:3-7, 472:13-13). As a further result, August stopped getting student referrals for discipline (RT 1439:19-1440:9). Cozens began to receive comments from the community and staff on the conflict in the school's leadership:

> I would say there are several ways in which the public expressed to me, individually expressed to me, their concerns about the administration of the school: Was it a team effort, were we all working towards the same goal or were we going in different directions? (RT 933:3-9)
>
> "Who is running that ship down there, anyway?" or "Do you have two heads at that school or one?" Those I can remember. (RT 932:22-24)

In 1974, San Ramon High School received its first limited, three year accreditation (as opposed to a maximum of five years) (RT 373:16-374:10). The Accreditation Report noted problems with administration at the school including the crisis in leadership and poor communications between the administration and the staff (RT 380:1-383:9). Due to August's in-fighting and lack of support, the small administrative team was having problems (RT 863:15-864:3, 865:13-15). The staff complained of their inability to communicate with August (RT 864:19-865:12). According to the secretaries in the school office, the situation between Cozens and August "deteriorated" and became "horrendous" (RT 1479:16) as August had secretaries type documentation "of what he felt were problems or inadequacies of the principal" (RT 1474:8-13).

In March 1974, students were caught "streaking" nude across the San Ramon High School campus. One of the students had been recommended for a Bank of America award for vocational arts. Mr. Horn, a faculty member, had recommended the student before the streaking incident (RT 1745:4-28). Cozens called a meeting of the two deans, the head counselor and vice principal. He asked for recommendations on how to deal with the situation. It was proposed to remove the streaker's name from the award competition. August proposed suspension but did not want the award denied. After meeting and hearing comments from the group regarding appropriate discipline, Cozens considered the input and decided to suspend the streakers and to withhold the student's name from the award competition (RT 1014:9-16).

August strongly disagreed. He wrote a lengthy memo to which Cozens replied, thanking him for the input, but stating that Cozens had already accepted recommendations, that the decision had been made, that it was final and that members of the administrative team were now expected to support that decision (RT 1130:7-27). Instead, August called the Bank to get them involved (RT 1015:7-12) and called in a group of teachers and counselors and asked them to dispute Cozens' decision and discuss how to get it changed. The teachers did not support August. One of them, Mr. Horn, went to Cozens and complained of August's action (RT 1749:1-1750:15). Cozens was upset that a member of his administrative team called members of his teaching staff together behind the principal's back to organize resistance to the principal's decision and because his dean could not accept a final decision which was at variance with his own opinion (RT 1131:21-1132:6).

The following school year was the last for both August and Cozens in administrative positions. Both were fully aware they were in trouble.

There were many petty arguments between the P.E. staff and August. The result was a series of written insult exchanges (RT 1190:13-1193:15) and angry confrontations between August and the P.E. teachers (RT 1597:26-1598:13; 1466:14-1467:7; 1513:21-1515:15). Their relationship was "becoming antagonistic,

antagonizing and basically, the relationship was breaking down" (RT 1607:24-1608:26).

The dispute continued over August's proper job function and whether it included teacher evaluation and curriculum. On November 27, 1974, a secretary inadvertently failed to arrange a substitute for Mr. Stevens, a teacher who had an approved absence for one class period. August found out the regular teacher was not present. The following day, August mounted an investigation of the teacher, calling six students out of classes and into his office. He interrogated the students with a series of questions reflecting on the teacher's curriculum and basic professional competency (RT 1386:15-1388:22).

By February 1, 1975, Cozens failed to see any improvement in August's situation. Management team meetings were increasingly ineffective and uncomfortable due to the arguments between August and Cozens (RT 1439:19-1440:9). Relations with the staff in general were hostile as teachers refused to send students to August for discipline (RT 1444:6-27). Finally, August had essentially no remaining working relations with the Boys' P.E. Department after several years of warfare (RT 1608:4-7). Cozens recommended reassignment of August back to a classroom position (Exhibit No. 10).

The Superintendent is required by law to give administrators notice of possible reassignment by March 15 of the prior school year. His recommendations are later formally presented to the Board for approval or disapproval (Ed. Code, § 44951). However, as a normal matter of business, the Board is informally notified of possible reassignments (RT 1845:27-1846:4).

On February 19, 1975, the superintendent notified August in writing that he was recommending that August be released from his position as dean of boys at the end of the 1974-75 school year and transferred to a teaching position. The letter sets forth seven reasons for the recommendation, as follows:

1. The principal has a lack of confidence in your judgment.

2. The principal has a lack of trust in you as a member of the administrative team.

3. A significant number of the staff find that they are unable to work with you.

4. Your failure to accept decisions made by the principal and your continued efforts to reverse his decisions have made administrative relationships extremely difficult.

5. We are concerned about your poor working relationships with staff members in other schools.

6. Your philosophical view that you are the student's ombudsman operates to the detriment of the instructional program.

7. Faculty morale has suffered because of your criticism of teaching methods and content when these areas are not assigned to you. (Exhibit No. 27)

Although the Education Code does not provide for a hearing, the Board agreed to provide a hearing at August's request (RT 1830:20-27).

After August made his notice of reassignment public (RT 1175:21-26), the faculty perceived that August was stirring student protests to help him retain his job. In response, one teacher, Mr. O'Gorman, wrote a letter commending the District's reassignment of August. He took the letter to campus and showed it to other teachers and staff. By the end of that school day, approximately 57 staff members (a large majority of the staff) had signed the letter as a petition supporting the demotion of August (RT 1527:8-1530:14).

At trial, the judge applied the constitutional balancing test and declared most of August's conduct to be constitutionally protected, including those areas discussed and others, including two letters to the newspaper. Since the District admitted that much of the job-related conduct declared protected (including calling his supervisor "incompetent") had led to the demotion, the jury verdict against the defendants was virtually mandated.

REASONS FOR GRANTING THE WRIT

The conduct of August, a member of lower management, is of such a disloyal and disruptive nature that it cannot be tolerated,

particularly in the school environment where one principal and two deans were responsible for up to 1700 students and over 60 staff members. Confusion exists in lower courts on the application of the standards of this Court set forth in *Connick v. Meyers* (1983) 461 U.S. 138, as displayed most prominently in this case where the California Supreme Court has sustained a ruling that a public school employer must accept as a member of lower management an employee who calls his immediate supervisor incompetent, both in public and in private. To allow such rulings to stand would render school districts hopeless to maintain order and efficiency. This Court should not allow state courts to eviscerate its holdings in this area.

A. PROTECTED FREE SPEECH SHOULD ADDRESS A MATTER OF PUBLIC CONCERN AND BE BALANCED AGAINST EFFICIENCY OF THE PUBLIC EMPLOYER

As recognized in the decision in this case by the California Court of Appeal:

> The focal point of this case is whether defendants reassigned August in retaliation for his exercise of his First Amendment rights. August asserts no other right to his position as school administrator. (Decision, page 12)[2]

The Court of Appeal goes on to state that the initial step of the constitutional analysis is to determine whether August's conduct is "speech on a matter of public concern" (Decision, page 13). If some of August's conduct constitutes speech on matters of public concern, the next step is the "Pickering balance" (*Pickering v. Board of Education* (1968) 391 U.S. 563.) Both of these steps are questions of law.[3]

Applying both of the above steps of the constitutional analysis, the trial court and Court of Appeal declared much of August's

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[2] The Decision of the Court of Appeal in this case is attached in the Appendix.

[3] The subsequent findings of fact by the jury are not relevant to the discussion here, being premised upon incorrect findings of law.

conduct to be protected (Decision, page 17). These findings do not follow United States Supreme Court precedent in this area.

Several years ago in *Connick v. Myers* (1983) 461 U.S. 138, the United States Supreme Court provided explanation of the appropriate constitutional analysis. In that case, an assistant district attorney passed out a questionnaire at work, implying criticism of her immediate supervisors and inducing others to express such doubts. The court said:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Ct. *Bishop v. Wood*, 426 U.S. 341, 349-350. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state. (461 U.S. 138, 147)

The Court continued:

> While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. *These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into cause celebre.*
>
> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark and certainly every criticism directed at a public official would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, *the First Amendment does not require a public office to be run as a roundtable for employee complaints over*

internal office affairs. (Emphasis added, footnotes omitted.) (461 U.S. 138, 148-149)

The Court held that except in one area, all aspects of that employee's conduct addressed matters of more personal, not public concern. However, since the Court determined that one aspect of the plaintiff's conduct addressed a matter of public concern, it proceeded to apply the *Pickering* balance test:

> The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. One hundred years ago, the Court noted the government's legitimate purpose in "prompt[ing] efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.' Ex parte Curtis, 106 U.S. 371, 373, (1882). As Justice Powell explained in his separate opinion in *Arnett v. Kennedy*, 416 U.S. 134, 168, (1974): 'To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." (461 U.S. 138, 150-151.)

The Court applied the balance test by looking at four factors. The first factor was impact of the conduct on ability to perform job duties. Next, the Court looked at impact on the efficient and successful operation of the office and need for close working relationships. The Court said:

> We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities. The District Court was also correct to recognize that 'it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors.' 507 F.Supp., at 759. Connick's judgment, and

apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection", was that Myers' questionnaire was an act of insubordination which interfered with working relationships. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships, is manifest before taking action. (461 U.S. 138, 151-152)

The Court then applied the third factor:

> Also relevant is the manner, time, and place in which the questionnaire was distributed. As noted in *Givhan v. Western Line Consolidated School Dist., supra,* at 415, n. 4, 48 L.Ed.2d 619, 99 S.Ct. 693, 'Private expression . . . may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.' Here the questionnaire was prepared, and distributed at the office; the manner of distribution required not only Myers to leave her work but for others to do the same in order that the questionnaire be completed. Although some latitude in when official work is performed is to be allowed when professional employees are involved, and Myers did not violate announced office policy, the fact that Myers, unlike *Pickering,* exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered. (461 U.S. 138, 152-153.)

The Court proceeded to a fourth factor:

> Finally, the context in which the dispute arose is also significant. This is not a case where an employee, out of purely academic interest, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of

> the transfer notice. When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office. Although we accept the District Court's factual finding that Myers' reluctance to accede to the transfer order was not a sufficient cause in itself for her dismissal, and thus does not constitute a sufficient defense under *Mt. Health City Board of Ed. v. Doyle*, 429 U.S. 274, (1977), this does not render irrelevant the fact that the questionnaire emerged after a persistent dispute between Myers and Connick and his deputies over office transfer policy. (461 U.S. 138, 153-154.)

The Court concluded:

> The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment. (461 U.S. 138, 154.)

In summary, the Court applies a two-step process to determine if conduct is constitutionally protected. First is the matter of public concern. Second, the balance test is applied with four factors: impact on performance of duties; impact on office discipline, working relationships and institutional efficiency; whether the conduct is in a proper time, appropriate place and manner; and finally, the general context of the conduct.

The conclusions reached by the trial court and the Court of Appeal (and sustained by the California Supreme Court) in this case cannot be reconciled with the Supreme Court's reasoning in *Connick, supra.*

B. AUGUST'S PUBLIC AND PRIVATE CRITICISMS OF COZENS, HIS IMMEDIATE SUPERIOR, CANNOT BE DEEMED CONSTITUTIONALLY PROTECTED CONDUCT

The lower courts ruled that August's long course of insulting, threatening and undermining his immediate superior was protected. August first called Cozens "incompetent" immediately after Cozens gave him a negative evaluation (RT 1322:7-1326:10). Several months later, Cozens told August he was considering August's reassignment (RT 1115:7-1116:22). August decided "to take a big risk" and again called Cozens "incompetent" (RT 1005:7-17). August declared that he was documenting a case against Cozens (RT 1109:1-20). Cozens responded that he would begin documenting August (RT 1108:16-20). A paper war resulted.

The relationship between Cozens and August deteriorated (RT 1614:5-17). Management team meetings became confrontations as August insisted on writing down everything said (RT 1618:12-28). Office secretaries complained of the "horrendous" situation as they had to type August's "documentation" of Cozens and others (RT 1479:16, 1474:8-13).

Such disruptive conduct was a major portion of the motivation for demotion. Evidence on this issue was presented at the hearing before the Board to support the demotion. Therefore, declaring this conduct protected virtually mandated the jury verdict that retaliation for such conduct did occur.

At trial, August presented himself as a whistle-blower, exposing Cozens' supposed incompetence. A similar allegation was addressed in *Murray v. Gardner* (D.C. Cir. 1984) 741 F.2d 434, 438:

> . . . the part of a "good government" partisan is no doubt very attractive as the last refuge of the incompetent or discontented. . . . his remarks appear to be an example of the quintessential employee beef: management has acted incompetently. Perhaps it did— . . . . If Connick's rule could be bypassed by the arguments that Murray raises—that public monies and government efficiency are involved—*Connick*

> would stand for nothing. We refuse to eviscerate so recent a holding.

The dispute between Cozens and August should not be a proper issue of public concern. August began the insults in response to his own negative evaluations and subsequent discussion of reassignment. He and Cozens became intertwined in a personality dispute. When a teacher's motivation is to protest his/her poor evaluation, the dispute should not be of public concern. (*Day v. South Park Independent School Dist.* (5th Cir. 1985) 768 F.2d 696, 699.) In *Saye v. St. Vrain Valley School Dist. Re-1J* (10th Cir. 1986) 785 F.2d 862, a teacher contended she had protested regarding protected concerns over education. The court granted a directed verdict against the plaintiff, stating:

> The circumstances in which the discussions here occurred indicate that Saye's speech, like that in *Connick*, was a mere extension of her dispute with Ploussard over the amount of aide *she* had been given, *see id.* at 1690, and an attempt "to gather ammunition for another round of controversy with her superiors," *id.* at 1691. These factors strongly indicate that Saye was speaking "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . ." (785 F.2d 862, 866)

Similarly, in *Alinovi v. Worcester School Committee* (1st Cir. 1985) 777 F.2d 776, a teacher disguised a personnel dispute with her superior as an educational matter. The court held:

> In light of Supreme Court precedent in this area, we do not think that the resolution of a pending personnel problem between a public school teacher and her employer is a matter of public concern. (777 F.2d 776, 787)

However, even if the dispute between Cozens and August was of public concern, when balanced with the employer's interest, it should clearly dictate that such conduct is unprotected. The impact of August's conduct was severe, destroying his working relationship with his immediate superior and rendering the management team's leadership at the school ineffective.

In *Roseman v. Indiana Univ. of Pennsylvania, at Indiana* (3rd Cir. 1975) 520 F.2d 1364, 1368, an associate professor was not rehired after she criticized the chairman of her department. The court discussed *Pickering* as follows:

> Pickering's attacks were on a remote superintendent and school board; in contrast, Roseman's called into question the integrity of the person immediately in charge of running a department which, it is fair to assume, was more intimate than a school district. The district court found that "plaintiff's attacks upon Faust's integrity in a faculty meeting would undoubtedly have the effect of interfering with harmonious relationships with plaintiff's superiors and co-workers." 382 F.Supp. [1938] at 1339. In making this finding, the district court reflected a similar concern expressed by the Supreme Court, which noted that Pickering's statements were "in no way directed towards any person with whom [Pickering] would normally be in contact in the course of his daily work as a teacher." . . . Because of this, Pickering's case raised "no question of maintaining either discipline by immediate superiors or harmony among co-workers." . . . The same obviously cannot be said of Roseman's faculty meeting accusations directed at the Acting Chairman of her Department.

In *Sprague v. Fitzpatrick* (3rd Cir. 1976) 456 F.2d 560, an assistant district attorney was dismissed based upon his having provided information to a news reporter which resulted in publicity adverse to his supervisor. The Court of Appeals affirmed dismissal of the Section 1983 complaint. Discussing *Pickering*, the court stated:

> The crucial variant in this balance appears to have been the hierarchical proximity of the criticizing employee to the person or body criticized. The court noted that the "statements are no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among co-workers is present here. Appellant's employment relationships with the board and, to a somewhat lesser extent, the

> superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." . . . the court also observed that "significantly different considerations would be involved" in cases where "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them." (546 F.2d 564.)

The court in *Sprague* continued:

> . . . Sprague's statements had "totally precluded any future working relationship between him and the defendant . . ." The first assistant district attorney—"alter ego" of the district attorney, his direct administrative and policymaking subordinate—declared in public that his immediate superior had not told the truth . . . Certainly we could not expect a district attorney to run an efficient office if his first assistant were free to impugn his integrity in public.
>
> It is true that Sprague's interview, in contrast to Roseman's criticisms, concerned matters of grave public import. But this does not tilt the *Pickering* balancing in favor of first amendment protection where, as here, the effectiveness of the employment relationship between employee-speaker and employer-target is so completely undermined . . . *Roseman* did not hold that the public importance of an employee's statements automatically created first amendment protection. Instead, that importance may be, *mutatis mutandis,* one of the factors to be weighed in favor of protecting the employee-citizen's right to speak on matters of general concern. (546 F.2d at 565.)

As noted earlier, San Ramon High School had only three administrators (plus a later vice-principal) responsible for the entire staff and campus. Cozens was the leader while August was the second level of management. As stated by Cozens:

> The administrative leadership of a large complex secondary school demands a close-knit team of administrators. These

> persons must work together in an environment of mutual confidence, shared philosophy, total cooperation and effective personal relations. (RT 863:23-28.)

August did not dispute the need for cooperation and trust. August agreed that "it is important that members of the administrative team support the administrative leader of the school." (RT 1068:13-15.)

Cozens presented his relations with August to the Board as a basis for the reassignment (RT 862:5-864:3). The Board found such behavior unacceptable. The trial court overturned the school board on this issue, dictating that the school district must accept such disruption of the school.

In *Duke v. North Texas State University* (5th Cir. 1973) 469 F.2d 829, a university deemed disrespectful conduct by a teaching assistant to her supervisor and resultant adverse publicity to be unacceptable. The Court held that:

> fact findings by academic agencies, "when reached by correct procedures and supported by substantial evidence, are entitled to great weight, and the court should never lightly substitute its judgment for that of the board." . . . "that courts should not interfere with the day-to-day operations of schools is a platitudinous but eminently sound maxim which this court has reaffirmed on many occasions." *Shanley v. Northeast Ind. School District* (5th Cir. 1972) 462 F.2d 960. Courts are not equipped by either training or experience to select initially the faculty and staff for colleges and universities, and to enjoin a university to hire or rehire a member of its faculty goes beyond mere redress of constitutional rights of an individual. We "should interfere only where there is a clear case of constitutional infringement." (469 F.2d 829, 838.)

In the present case, the District's determination of unacceptable behavior towards a supervisor should have been sustained. Just as in *Duke, supra,* August owed the school

> a minimal duty of loyalty and civility to refrain from extremely disrespectful and grossly offensive remarks aimed at

> the administrators of the University. By [his] breach of this duty, the interests of the University outweighed [his] claim for protection. (469 F.2d 829, 840.)

(See also *Hochstadt v. Worcester Foundation, Etc.* (1st Cir. 1976) 545 F.2d 222, 229-230.) August's criticism was not just from a member of staff but was a direct, abusive attack by an immediately subordinate member of the management team. Such disloyal and disruptive conduct must result in demotion from that management team.

Regarding the obvious impact of this conduct, the Court of Appeal stated, "August's criticism had to affect the relationship between August and Cozens." (Decision, page 19.) The decision does not even address the public criticism of Cozens. The ultimate finding that such conduct could be protected cannot be reconciled with the Supreme Court decision in *Connick, supra.*

C. AUGUST'S ATTEMPT TO UNDERMINE THE AUTHORITY OF HIS IMMEDIATE SUPERIOR SHOULD NOT BE DEEMED PROTECTED CONDUCT

After students "streaked" nude across campus, Cozens called a meeting of administrators and counselors for their recommendations on appropriate discipline. August spoke his mind that while suspension was appropriate, denial of an opportunity to win a vocational arts award to one streaker was not. Cozens then considered and made the decision to deny the award, a decision properly his. August continued to argue, sending a lengthy memo to Cozens which Cozens thanked him for but repeated that the decision was final and that as a member of the management team, August was now expected to support it. Instead, August called a meeting of subordinate teachers to question and stir up resistance to Cozen's decision (RT 1015:7-12).

In *Connick v. Myers, supra,* the Court addressed distribution of an in-office questionnaire seeking opinions on supervisors' actions. The conduct was disciplined as inciting a " 'mini-insurrection' within the office" (431 U.S. 138, 141). Similar to the present case, the Supreme Court held that:

> Questions, no less than forcefully stated opinions and facts, carry messages and it requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in Connick and his supervisors. Thus, Question 10, which asked whether or not the Assistants had confidence in and relied on the word of five named supervisors, is a statement that carries the clear potential for undermining office relations. (461 U.S. 138, 152.)

In *Roberts v. Van Buren Public Schools* (8th Cir. 1985) 773 F.2d 949, 956, the court noted that under the *Pickering* balance test:

> . . . a government as an employer has a legitimate interest in achieving compliance with decisions that, while open to dispute and discussion, have been through proper channels.

In the present case, August continued resistance after the proper time for comments had closed. His actions occurred during work time and behind Cozens' back.

The actual concern raised here was not a matter of public concern but part of the continued dispute and challenge to Cozen's authority. The minimal public concern was acknowledged by the Court of Appeal, which stated that "Although not a particularly earthshaking controversy, the interest in the matter can be translated into public concern." (Decision, page 20.) Balancing this minimal public concern, the Court of Appeal acknowledged that August "exercised poor judgment" and "probably exceeded the bounds of reasonable dissent" (Decision, page 21), yet remarkably still found the conduct protected.

However, August's action violated his duty of loyalty as a member of the management team. The action was a disloyal act by a member of lower management, inciting dissatisfaction among subordinates. In *Patterson v. Masem* (8th Cir. 1985) 774 F.2d 251, a school administrator felt a comedy play was racially offensive. Against orders, she resisted the production. That court held:

> Here a play was selected by the school district . . . it was Dr. Patterson's duty to respect the district's choice. While her conduct did indeed address a matter of public concern, it also interfered with the proper performance of her job. (774 F.2d 251, 257.)

In *Brousseau v. United States* (USCC 1981) 640 F.2d 1235, a member of lower management was properly demoted for openly encouraging and inviting opposition from subordinates to a decision of his superiors. That court stated:

> The instant plaintiff's common sense should have forewarned him that his two activities in question here were improper and could lead to his demotion. The position of chief of M&B of the CSA region VIII office conferred management employee status on its holder. Inherent in the occupancy of this position was an obligation not to invite or encourage opposition by nonmanagerial employees to plans or proposals advanced by CSA management, especially superior management. By making the motion that the Gabusi management proposal be rejected and by preparing and circulating the petition opposing elimination of the management and budget division, Brousseau thrust himself into a clear conflict of position. He flouted, not once but twice, the elemental duty of loyalty which he, as a management employee, owed to his immediate superior and to other management officials. We do not hesitate to find that Brousseau's awareness that he was chief of M&B necessarily entailed an awareness on his part of the just stated duty of loyalty. (At p. 1247.)
>
> By preparing and circulating the petition opposing this proposal, plaintiff violated the duty of loyalty which he owed to Vanderburgh. By violating this duty of loyalty, plaintiff eviscerated any trust or confidence which Vanderburgh had in him. The loss of such trust or confidence made a close working relationship between the two men impossible. (At p. 1248.)
>
> Moreover, plaintiff's demotion was justified because it served to maintain discipline among and preserve the solidarity of CSA management employees. By circulating the petition,

> plaintiff was encouraging nonmanagerial employees to oppose a proposal advanced by a member of CSA management. Such encouragement was improper. Management cannot function effectively unless it operates "with one voice" vis-a-vis others. *Cohesive operation of management is dependent on the loyalty of inferior management to superior management. This loyalty must be maintained in situations involving management's relations with nonmanagerial employees. For management to countenance disloyalty in such situations would be for management to render itself impotent.*
>
> * * *
>
> By making the motion in question, plaintiff, a management employee, actively invited and encouraged nonmanagerial employees to oppose the proposal. For all the reasons discussed heretofore, such disloyalty on the part of a management employee was improper and substantially detrimental to the efficiency of CSA management. (Emphasis added.) (At p. 1249)

(On duty of loyalty from lower management, also see *Germann v. City of Kansas City* (8th Cir. 1985) 776 F.2d 761; *Brown v. Dept. of Transp.* (F.C. 1984) 735 F.2d 543, 547; *Norbeck v. Davenport Community Sch. Dist.* (8th Cir. 1976) 545 F.2d 63, 66.)

D. AUGUST'S COMPLETE BREAKDOWN IN RELATIONS WITH SUBORDINATES CANNOT BE DECLARED PROTECTED CONDUCT

August had running battles of bickering and insults with the Boys' P.E. Department which were declared by the Court of Appeal to be protected. The Court of Appeal declared "Calling August's interaction with the Boys' P.E. Department a 'working relationship' would be a gross misstatement." (Decision, page 23.) August was in charge of boys' discipline and attendance and therefore had to work with the boys' P.E. teachers.

A running, bickering personality dispute between employees is not a matter of public concern. Even if it were, the dramatic impact on working relationships certainly renders the conduct

unprotected. In *Derrickson v. Board of Educ. of City of St. Louis* (8th Cir. 1984) 738 F.2d 351, the court ruled on a teacher's well-intentioned but "frequent, lengthy and uncompromising criticisms" of administration and faculty, stating:

> In particular, the disruptive manner and frequency of Derrickson's internal criticisms weighed heavily against first amendment protection of those activities when placed on the *Pickering* balance, even assuming that all of his criticisms touched upon matters of public concern. Although we agree with the district court that Derrickson's activities at McKinley were apparently out of genuine concern for improving the quality of education and level of discipline at the school, we cannot on this record say that the first amendment shielded him from adverse personnel action based on his attendant inability to work with his superiors, peers, and students in a conciliatory manner. (738 F.2d 351, 353.)

In *Chitwood v. Feaster* (4th Cir. 1972) 468 F.2d 359, 360-361, the court noted that a teacher's "bickering and running disputes" are not protected "simply because his noncooperation and aggressive conduct are verbalized."

August's problems with the Boys' P.E. Department began when he called sixty students together to solicit complaints about the department. In *Clark v. Holmes* (7th Cir. 1972) 474 F.2d 928, a teacher conducted "surveys" of students on class curriculum and criticized other staff members to students. The court held that:

> His disputes with his superiors and colleagues about course content and counselling were not "matters of public concern" and involved Clark as a teacher rather than as an interested citizen. (474 F.2d 928, 931.)

His criticisms of staff before students were similarly deemed unprotected.

E. AUGUST'S PERCEPTION OF HIS JOB FUNCTIONS WAS CONTRARY TO HIS BASIC JOB DUTIES

August perceived his job rose as the ombudsman for parents and students in the system. The District dictated a different role for the dean of boys, mainly to support the staff in discipline and

attendance problems (RT 1446:1014). The sustained ruling of the trial court held that August's "public and private advocacy, orally or verbally, of the rights of students and parents within the educational system" was protected conduct. (RT 1959:20-1960:21.) The Court made no distinction between on-duty or off-duty "advocacy" for students, even if such advocacy conflicted with the proper performance of his job. The trial court went further and listed several specific instances of such protected conduct: August's participation in and encouragement of a student protest in 1974, and his subsequent meeting with the Board on that protest; his "meetings and discussions with the Green Valley parents", and "his letter to the Wolfprint in 1974" (RT 1959:20-1960:21). August's mistaken perception of his job function as an advocate and his opinions of internal school matters are not matters of public concern (See *Ferrara v. Mills* (11th Cir. 1986) 781 F.2d 1508, 1515-1516). Futhermore, the impact of August's conduct in each of these following areas or incidents renders the conduct unprotected.

1. August's Advocacy Of Student Rights As Part Of His Job Rendered His Performance Useless To The Employer

A simple conflict arose between August and his employer over the most basic aspect and philosophy of his job duties: was he there to protect students' rights against the teachers (as he felt) or was he the Dean of Boys, assigned to support staff by receiving referrals and implementing appropriate discipline? Every single teacher (including all those called as witnesses by August) testified that August was perceived as not supporting staff in discipline matters. He was warned repeatedly over the years that his job function was to "support the teachers in disciplining students or controlling student behavior regardless of what he felt about the individual teacher" (RT 1349:25-27). August continued at the time of trial to argue his view of his job function against the views of the Board, the Superintendent and his supervisor. In addition, it was not only August's philosophy of his job that created problems, it was his method, as he aggressively criticized and threatened the teachers' basic professional competency (RT 1319:26-1320:3).

The District was entitled to define the proper role of Dean. August attempted to change the basic role of his job. In *Clark v. Holmes* (7th Cir. 1972) 474 F.2d 928, a teacher insisted on redefining his curriculum and job role. He held himself as a "personal confidant of his students" and changed his curriculum to what he perceived were the "students' interests." The Court granted a directed verdict against that plaintiff's action.

Furthermore, the District has a right to insist on a philosophical approach to the job, particularly for a member of lower management with a highly discretionary role in student discipline. In *Hetrick v. Martin* (6th Cir. 1973) 480 F.2d 705, 707, a teacher was fired because her:

> . . . teaching philosophy and the manner in which she implemented it were not adaptable to the achievement of the academic goals of the University.
>
> * * *
>
> The court is not in a position to weigh the merits of Dr. Hetrick's educational philosophy—it may be that her methods of teaching were and are more desirable than those embraced by the other members of the English Department—but the fact that the University decided that they were not and chose not to renew her contract, does not mean that her constitutional rights to academic freedom and freedom of speech were impinged.

The court concluded that the employer was entitled to insist on a "by the book" method or specific "pedagogical attitude" (480 F.2d 705, 707-708).

In the present case, the California courts have improperly dictated that the District must accept an administrator whose basic approach to his job duties conflicts with the District's own.

August's advocacy of student rights on the job had dramatic impact. In response to August's use of his position as the advocate for student rights in the discipline process, teachers refused to send referrals to August. Some sent boys to counselors or to the dean of girls for discipline (RT 1492:3-9, 1473:5-6). August made *no* contrary presentation on these issues. In fact, according

to Mr. Russo, the first teacher called as a witness by August, he stopped sending discipline referrals to August because "I knew that there was no point in sending them. I had to solve the problem if at all possible, because nothing ever happened when I sent them." (RT 312:14-19.) The second and only other teacher called by August spoke of "widespread" teacher "frustration" that August always took the students' side (RT 452:13-453:20).

The third witness called by August testified that the staff complained that August "tended to take students' sides in disputes" (RT 472:19-23) and that August caused the staff to be defensive after discipline referrals by investigating teachers with the "aura of evidence-gathering of a sort of courtroom process." (RT 475:20-27.)

A long parade of witnesses called by both parties all testified to essentially the same thing: August did not support teachers in disciplinary matters but usually argued the side of the students, advocating "student rights" in an almost criminal defense manner. As a result, according to the two teachers and a staff psychologist called by August plus the dean of girls, vice-principal, five teachers and two secretaries called by the District, August had very poor relations with staff.[4]

2. August's Advocacy Of A Student Walkout Conflicted With His Job Duties

In another incident, August encouraged student misbehavior as a protest. August wrote a letter to the "Wolfprint", the high school newsletter, suggesting to and encouraging students that they walk out of an assembly in protest (RT 1029:20-28). To have the Dean (responsible for student supervision and discipline) suggest that students walk out of an assembly in mass would clearly create chaotic disruption at the school. In *Brown v. Dept. of Transp., F.A.A.* (F.C. 1984) 735 F.2d 543, a member of lower management spoke in support of a strike to subordinate employees. That court held such encouragement to be unpro-

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[4] (RT 312:12-19, 453:3-16, 472:13-23, 1444:25-26, 1472:21-26, 1489:2-13, 1512:22-28, 1526:24-28, 1541:14-21, 1608:23-26, 1636:24-28, 1666:12-18.)

tected, stating that the manager's "common sense" should have forewarned him that such encouragement was inappropriate for his position (753 F.2d 543, 548).

3. August's Public Misrepresentation Of District Policy Cannot Be Deemed Protected Speech

August went to meet with the parents of another school to discuss their rights and instruct them on how to "deal" with the District. Among other things, he told them they could insist to select their child's teacher (RT 1142:1-13). The principal at that elementary school objected to August's inserting himself into the elementary school's situation (RT 1505:8-9). August met with the parents in his role as a district administrator, not as a private citizen. The Superintendent was concerned that August misrepresented District policy on transfers. Encouraging parents to demand selection of teachers would create serious problems (RT 1142:1-21). The Superintendent also told August that it was inappropriate for a high school administrator to involve himself with a group of parents at another elementary school prior to discussion with the Superintendent, particularly when sensitive issues such as parent complaints about teachers and curriculum were to be discussed (RT 1143:1-16). At the time of trial, August was still disputing the Superintendent on interpretation of District policy (RT 1141:12-1143:16). Such a dispute by lower management on the meaning of District policy cannot be tolerated. As stated by the court in *Brown v. Dept. of Transp. F.A.A., supra,* 735 F.2d 543, 547:

> . . . Brown's position as a supervisor . . . weighs heavily on the agency's side. As was stated by a predecessor court in a first amendment context: Management cannot function effectively unless it operates 'with one voice' *vis-a-vis others* [emphasis in original]. Cohesive operation of management is dependent on the loyalty of inferior management to superior management. This loyalty must be maintained in situations involving management's relations with nonmanagerial employees. For management to countenance disloyalty in such situations would be for management to render itself impotent. (*Brousseau,* 640 F.2d at 1249. See also *Pickering,* 391 U.S. at 570, 88 S.Ct. at 1735.)

The school district is entitled to insist that management speak "with one voice" on matters of district policy.

The Court of Appeal dismisses this incident as unrelated to job performance because:

> At the meetings with the Green Valley parents, matters unrelated to San Ramon High School were discussed. (Decision, p. 26.)

However, August's employer was the school district, not the high school; August discussed matters of District practice and policy while speaking in his role as a district administrator. Furthermore, August misrepresented District policy on student transfer. Therefore, the relationship to and impact on his job is apparent.

In *Kotwica v. City of Tucson* (9th Cir. 1986) 801 F.2d 1182, an employee misrepresented city policy in a newspaper interview. The Ninth Circuit upheld the subsequent discipline, stating:

> The employee's argument is fallacious as well. Egocentric in design, Kotwica's contention is that her speech alone, not the official policy of the agency, has value for the public. That is not the case. The government's stake in the accurate announcement of its own policy is more than legitimate, it is vital to constitutional rule. Whether wise or foolish, the policy of the government must be known and understood if the public is to hold its authors to account.
>
> (*Id.* at p. 1184.)

Also see *Hall v. Ford* (D.C. Cir. 1988) 856 F.2d 255, 259. The contrary analysis in the present case cannot be maintained.

CONCLUSION

The United States Supreme Court has laid down standards of constitutional analysis in *Connick v. Myers*. Those standards require further clarification at this time. The California courts' application of those constitutional standards are not within the explicit wording nor spirit of the appropriate test. Most clearly, requiring a public school district to accept as protected conduct a lower management employee repeatedly calling his immediate supervisor "incompetent" would lead to absurd results and uncontrollable situations. Many school districts in this nation face "Boyer August behavior" all too often.

Based on the foregoing, Petitioners urge that the petition for writ of certiorari be granted.

DATED: June 23, 1989

Respectfully submitted,

BREON, O'DONNELL & MILLER
KEITH V. BREON

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Attorneys for Petitioners

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Appendix A

Order Denying Review
After Judgment By the Court of Appeal

1st District, Division 1, No. A032547
S008795

In the Supreme Court of the State of California

In Bank

Boyer August, Respondent,

vs.

Edward Merrill, et al., Appellants.

[Filed March 29, 1989]

Appellants' petition for review DENIED.

Panelli, J. and Kaufman, J., are of the opinion the petition should be granted.

LUCKY
Chief Justice

Appendix B

Court of Appeal of the State of California
in and for the
First Appellate District

Division One

No. A032547

Alameda Co. Superior Court 590468-4

Boyer August, Plaintiff and Respondent,

vs.

Edward Merrill, et al., Defendants and Appellants.

[Filed Jan. 20, 1989]

By the Court:

The petition for rehearing is denied.

Dated: Jan. 20, 1989

NEWSOM, J.
Acting P.J.

Appendix C

Not to Be Published in Official Reports

In the Court of Appeal of the State of California

First Appellate District

Division One

A032547
(Alameda Co. Sup. Ct. No. 590468-4)

Boyer August,
Plaintiff and Respondent,

vs.

Edward Merrill, Joseph De Hope, Virginia Jouris,
Robert Arrigoni, Harold Zuckerman,
Allan J. Petersdorf, James Cozens,
Defendants and Appellants.

After being reassigned from an administrative position back to the classroom, plaintiff filed suit, alleging he had been reassigned as a result of his exercise of his right of free speech. The jury returned a verdict in favor of plaintiff, and against school board members, school superintendent, and school principal. Defendants appeal, contending the trial court erred in finding certain conduct by plaintiff constitutionally protected, and the jury erred in finding plaintiff would not have been reassigned on the basis on his unprotected conduct alone.

The judgment is affirmed.

STATEMENT OF FACTS

After teaching for five years at Clayton Valley High School, plaintiff Boyer August was appointed Dean of Boys at San Ramon High School in 1970. In his new position, August reported to defendant James Cozens, the principal at San Ramon High School. His responsibilities included student attendance, student discipline, supervision of extracurricular activities, and other miscellaneous administrative duties. August broadly viewed his responsibilities as student "attendance, behavior and welfare."

During August's tenure as Dean from 1970 to 1975, his outspokenness on problems at the school caused a great deal of friction between himself, Cozens, teachers at the school, and members of the school board. The parties have focused on certain specific incidents, beginning with August's grant of "Christmas Clemency" for truant students in December, 1970. This was a "spontaneous idea" on August's part, to forgive unexplained absences. Some teachers reacted negatively to the plan.

The next December (1971), August decided to repeat the program. When August informed Cozens of his intention, Cozens told August not to offer Christmas Clemency again. August decided it was a good program and approached Cozens again a few days later. According to August, he could tell Cozens was "upset" and "critical about it," but Cozens "didn't say anything." August went ahead and offered clemency a second time. In a March, 1972, evaluation of August's performance, Cozens noted August's insubordination, and recommended reemployment of August "with reservations."

In late 1972 and early 1973, members of the student government approached August with complaints regarding the Boys' Physical Education Department. In March, 1973, after investigating the situation, August issued a report critical of the department's methods and practices. What followed might be described as all out war between August and the Boys' P.E. staff. There were many petty, and some not so petty disputes (two are described below in this chronological account) between August and members of the P.E. staff.

In Spring of 1973, a guest editorial appeared in a local newspaper in which a parent complained about the school district's responsiveness, or more accurately, the lack thereof. August and his wife wrote a letter to the editor of the newspaper which complimented the parent on her courage to speak out. The letter went on to set out August's and his wife's general philosophy on education. The letter did not specifically address problems at San Ramon High School, but it did include the statement that "many" administrators "spent years of their lives compromising their basic principles to achieve their goals of better position

[sic]." Predictably, some of the other administrators in the district were not pleased with the letter.

Shortly after the publication of the letter, August sent a memorandum to the superintendent and all administrators in the district proposing that he teach a parent education class on "Parent and Student Rights." In August's own words, the response to his proposal was "[v]ery negative." However, a year later he was able to offer the class through the Adult Education Program.

In May, 1973, the "Tann" incident occurred. Kathryn Tann, a regular teacher at the high school, filled in one period for an absent teacher. Tann experienced difficulties with a few students. She referred three boys to August for discipline. August listened to the explanation offered by the boys, and sent them back to class without officially disciplining them at that time. Tann was incensed. She wrote to Cozens that she felt August doubted her integrity, and was questioning her judgment and teaching methods. August believed that there had been some miscommunication. The students were later formally disciplined.

Cozens considered questions about curriculum and classroom instruction "not under the jurisdiction of the Dean of Boys . . . ." Beyond the matter of August's jurisdiction, Cozens was concerned that August's manner of approaching teachers was alienating them and was not productive. Some teachers felt August took the side of the student. The teachers would hesitate to refer students to August. August acknowledged that he viewed himself as sort of an "ombudsman" for the students.

In meetings with Cozens in June and December, 1973, August criticized Cozens' performance. August told Cozens he was "incompetent." According to Emma Wilson, Dean of Girls, and Gerry Welch, the vice-principal, Cozens and August began to argue at staff meetings during 1974, making it "difficult to sit through them."

In January, 1974, a large group of students demonstrated to protest a change in school hours. When the students began a march to the school district offices approximately two and one-half miles away, Cozens directed August and Welch to accom-

pany the students for supervision and to insure the students' safety. Cozens remained at the school. Although Cozens believed August followed his instructions, he later heard reports that August had been seen "laughing and joking" with the students and "having a good time sharing with them their experience." Some members of the board of education believed August instigated the demonstration. Following the demonstration, August wrote a letter to the board complimenting them and the superintendent on their handling of the matter, yet defending the students' right to protest.

The next incident took place in March, 1974. Two students were caught "streaking" (running naked) across the campus. One of the students had been nominated for a Bank of America scholarship. As part of that student's punishment, Cozens had the nomination withdrawn. Articles and letters to the editor regarding the nomination, the streaking incident, and the subsequent withdrawal of the nomination appeared in local newspapers. August tried to persuade Cozens to reconsider. When Cozens refused, August approached a few teachers familiar with the situation and the student, in an attempt to rally support for the student. When the teachers refused to intervene, August dropped the matter.

Also in March, 1974, August attended a school board meeting at which the failure of a school bond issue was discussed. When a member of the board criticized the Parent-Teacher Association for its lack of cooperation, August rose to rebut the criticism. Once again, the board was not pleased with August's actions. The Board President, Robert Arrigoni, cut-off August's response. A report of the meeting appeared in the local press.

In September, 1974, at the beginning of the 1974-1975 school year, the Boys' P.E. teachers refused to conduct classes, because of the poor condition of the school's facilities. The teachers had the students sit in the stands in the gymnasium for their assigned P.E. period. When four students refused to sit in the stands, they were referred to August. Since he thought the students had a legitimate complaint, August referred them to Cozens. August also filed a formal "grievance" regarding the matter. The school board ultimately found the grievance to be justified.

At this time, August began to teach his adult education classes on student and parent rights. The classes generated some interest in the community and a significant number of articles in local newspapers. Also, in response to a request from a parent, August spoke on student and parent rights at meetings held by parents of students from another school in the district (Green Valley School).

On September 27, 1974, August wrote a letter to the school newspaper, the "Wolfprint." The letter represented a public apology to freshman students for verbal harassment they suffered at a voluntary assembly from the older students. In the letter, August suggested that the freshman students did not have to tolerate such abuse. August concluded the letter with the query, "Seeing that all of the assemblies and rallies are voluntary, what would have happened if your entire class walked out of the gym last Tuesday?"

On the Wednesday before Thanksgiving, 1974, August discovered a freshman orientation/health education class without a teacher. The teacher, Dan Stevens (a member of the P.E. staff), had requested a substitute, but none had been procured because of an error by a seretary. Due to past problems with freshmen orientation classes, August took this opportunity to launch an investigation of Stevens' curriculum. August called in several students from the class, who reported that Stevens showed football films during class. August reported his findings to Cozens.

August was required to submit a list of objectives for the 1974-1975 school year. Since he and Cozens could not agree on his objectives, August refused to submit a list. August eventually complied, but not before intervention by the superintendent.

In a memorandum dated October 30, 1974, Cozens informed August he was considering recommending August's reassignment. The memo stated 13 reasons for Cozens' proposed action.[1] It

[1] The 13 reasons included lack of confidence in August's judgment, lack of trust, the faculty's lack of respect, the faculty's refusal to refer students to August, advocacy of having students walk out of an assembly, advocacy of student demonstrations, non-acceptance of decisions

further stated the recommendation would be different if Cozens saw some improvement before February 1, 1975.

In February, 1975, Cozens formally recommended August's reassignment. On February 19, the superintendent, Allan Petersdorf, notified August of his intention to recommend to the school board, August's reassignment to a teaching position. The letter sets forth seven reasons for the recommendation:

> "1. The principal has a lack of confidence in your judgment.
>
> 2. The principal has a lack of trust in you as a member of the administrative team.
>
> 3. A significant number of the staff find that they are unable to work with you.
>
> 4. Your failure to accept decisions made by the principal and your continued efforts to reverse his decisions have made administrative relationships extremely difficult.
>
> 5. We are concerned about your poor working relationships with staff members in other schools.
>
> 6. Your philosophical view that you are the students' ombudsman operates to the detriment of the instructional program.
>
> 7. Faculty morale has suffered because of your criticism of teaching methods and content when these areas are not assigned to you."

The superintendent offered August the opportunity to present his views to the school board.

In a letter dated February 24, 1975, Cozens submitted his resignation from his position as principal (effective at the end of

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made by the principal, relations with the Boys' P.E. staff, the effect of his attitudes on administrative working relationships, his philosophical approach to job ("ombudsman"), criticism of faculty teaching methods, and his general effect on the working relationships and morale of the entire staff.

the school year), and a request for reassignment to a teaching position.

At a school board meeting held on March 17, 1975, August appeared with his attorney and made his presentation. Cozens made a presentation supporting the recommended reassignment. Among the documents Cozens presented in support of August's reassignment, was a letter circulated by one of August's foes, Thomas O'Gorman, head of the English department and one of the athletic coaches at San Ramon High. Approximately 50 teachers signed the letter. Parents, students, and a few teachers sent letters to the board in support of August. With the exception of the March, 1972, evaluation discussed, *supra*, written evaluations of August's performance, prepared by Cozens throughout August's term, were generally positive, though they consistently noted August's problem communicating with the teachers.

The board approved the superintendent's recommended reassignment of August to teaching duties at another school for the next school year.

Procedural History

August filed his original petition for writ of mandate on May 19, 1975, in Contra Costa County Superior Court. After the trial court sustained a demurrer to August's petition, he filed his first amended petition for writ of mandate, and complaint for declaratory relief, injunctive relief and damages. August named as respondents and defendants: The San Ramon Valley Unified School District; the Board of Education of the San Ramon Unified School District; the individual members of the board; the superintendent, Petersdorf; and Cozens. August alleged he had been reassigned in retaliation for the exercise of his rights under the federal and state constitutions, and in violation of federal law.

The trial court denied the petition for writ of mandate on the grounds that August had no tenure in his administrative position, and that he had not raised the constitutional argument at the March 17, 1975 board meeting, thus failing to exhaust his administrative remedies. The trial court also granted partial summary judgment in favor of the school district, insofar as the

action sought monetary damages pursuant to 42 United States Code section 1983.[2]

On January 13, 1977, a jury trial commenced on August's action for damages against the individually named defendants (board members, Petersdorf, and Cozens), pursuant to 42 United States Code section 1983.[3] The jury returned a verdict in favor of August and awarded him damages in the amount of $25,000. The trial court, however, granted defendants' motion for judgment notwithstanding the verdict, and defendants' motion for a new trial, should the former order be successfully attacked on appeal.

In an opinion filed March 22, 1982, this court reversed the order granting judgment notwithstanding the verdict, but upheld the denial of the petition for writ of mandate and the order granting a new trial.

The action was transferred to Alameda County Superior Court pursuant to stipulation by the parties.

A second jury trial commenced on August's action for damages pursuant to 42 United States Code section 1983, on April 2, 1985. On the 24th day of trial, the jury returned a verdict in favor of August. The jury awarded August the sum of $45,142, from each of the five board members and Cozens, and $45,148 from Petersdorf (total award $316,000). In addition, the jury assessed exemplary damages of $600 against Cozens, and $1,000 against Petersdorf. Defendants filed separate motions requesting judgment

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[2] 42 United States Code section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

[3] The parties have not indicated why August did not or could not proceed against the school board.

notwithstanding the verdict, and a new trial on the issue of damages. The trial court denied defendants' motions. A trial court order awarding August attorney's fees in the amount of $294,470 is the subject of a separate appeal (A035532).

Discussion

I. Constitutional Analysis

The focal point of this case is whether defendants reassigned August in retaliation for his exercise of his First Amendment rights. August asserts no other right to his position as school administrator.

We start with the general principal stated in *Pickering v. Board of Education* (1968) 391 U.S. 563, "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees." (*Id.* at p. 568.) Since *Pickering*, the United States Supreme Court has several times returned to this "problem" and refined the methods for its solution. (See *Mt. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S. 274; *Sivhan v. Western Line Consol. School Dist.* (1979) 439 U.S. 410; *Connick v. Myers* (1983) 461 U.S. 138; *Rankin v. McPherson* (1987) 107 S.Ct. 2891.)

The initial step of the constitutional analysis is to determine if August's conduct can be "fairly characterized as constituting speech on a matter of public concern. . . ." (*Connick v. Myers, supra*, 461 U.S. at p. 146; *Rankin v. McPherson, supra*, 107 S.Ct. at p. 2897.) If it cannot be characterized as such, the inquiry ends. (*Connick*, 461 U.S. at p. 146.) "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." (*Ibid.*) The "content, form, and context" of the employee's speech is examined to determine if it addresses a matter of public concern. (*Id.* at pp. 147-148.)

If some or all of August's conduct constitutes speech on matters of public concern, we then proceed to the next step—the "Pickering balance." (*Id.* at pp. 149-150.) In *Connick*, the Supreme Court identified several factors to consider: Whether the speech impeded the employee's ability to perform his or her responsibilities; whether the speech disrupted essential close working relationships or undermined office relations; the manner, time, and place of the speech; and, the context in which the dispute arose. (*Id.* at pp. 151-153.)

The inquiry up to this point presents a question of law. "The ultimate issue—whether the speech is protected—is a question of law." (*Rankin v. McPherson, supra*, 107 S.Ct. at p. 2897, fn. 9; *Connick v. Myers, supra*, 461 U.S. at p. 148, fn. 7.) "Because it is an inquiry of law rather than fact, [citation], our standard of review is de novo." (*Allen v. Scribner* (9th Cir. 1987) 812 F.2d 426, 430, fn. 8; see also *Page v. DeLaune* (5th Cir. 1988) 837 F.2d 233, 237; *Roberts v. Van Buren Public Schools* (8th Cir. 1985) 773 F.2d 949, 955.)

August argues the trial court's rulings on protected conduct should be sustained if supported by substantial evidence, and he cites several California appellate cases which support his position. (*Ofsevit v. Trustees of Cal. State University & Colleges* (1978) 21 Cal.3d 763, 772-775; *Adcock v. Board of Education* (1973) 10 Cal.3d 60, 65-66; *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575, 589-593; *Shimoyama v. Board of Education* (1981) 120 Cal.App.3d 517, 523-524.) However, these cases predate *Connick* and *Rankin*, did not apply the analysis set forth in those cases and, therefore, they cannot control here. In *Franklin v. Leland Stanford Junior University* (1985) 172 Cal.App.3d 322, the court reconciled the preceding California appellate decisions with federal case authority by deciding they applied the substantial evidence standard of review only to the causation steps of the constitutional analysis (discussed *infra*). (*Id* at p. 331, fn. 5; see *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 846, fn. 7.)[4]

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[4] It would seem, however, that appellate courts must accord some deference to the factual findings underlying the ultimate issue. (See *Germann v. City of Kansas City* (8th Cir. 1985) 776 F.2d 761, 764.)

The final two steps of the constitutional analysis are the aforementioned causation steps and, as noted in *Franklin,* are factual questions, examined in accordance with the substantial evidence standard of review. (*Givhan v. Western Line Consol. School Dist., supra,* 439 U.S. at pp. 416-417; *Mt. Healthy City Board of Ed. v. Doyle, supra,* 429 U.S. at pp. 285-287.) August must show his protected speech was a substantial or motivating factor in the Board's decision to reassign him. (*Mt. Healthy,* 429 U.S. at p. 287.) If August carries that burden, the Board may show it would have reassigned August, even in absence of the protected speech (i.e., based on his unprotected speech/ conduct). (*Ibid.*)

Intermediate level federal appellate courts have summarized the constitutional analysis in three steps. "First, plaintiffs must demonstrate that their conduct was protected; second, plaintiffs must demonstrate that such protected conduct was a substantial or motivating factor in the adverse employment decision; and third, the employer may show that the employment action would have been taken even in the absence of the protected conduct. [Citations.]" (*Roberts v. Van Buren Public Schools, supra,* 773 F.2d at pp. 953-954; *Johnson v. Lincoln Univ. of Com.* (3rd Cir. 1985) 776 F.2d 443, 450; see also *Shimoyama v. Board of Education, supra,* 120 Cal.App.3d 517, 524-525.) As *Connick* and *Rankin* explained, the first step above (whether the conduct was protected), is itself a two step process: A) whether the speech addresses a matter of public concern; and, B) the *Pickering* balance. (See *Roberts v. Van Buren Public Schools, supra,* 773 F.2d at p. 954.)

". . . the underlying historical facts upon which the constitutional claim is grounded are subject to the traditional standards of review governing the treatment of historical facts in any other case. [Citations.]" (*Saye v. St. Vrain Valley School Dist. RE-1J* (10th Cir. 1986) 785 F.2d 862, 865.) Therefore, all underlying factual matters should be viewed in support of the judgment. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

Defendants contend the trial court incorrectly ruled much of August's conduct was protected.[5] In addition, they contend the jury did not properly consider their argument that August would have been reassigned even in absence of his protected conduct. The number of instances of conduct considered at trial make this case exceedingly complex, and factually distinguish it from most of the appellate decisions the parties cite.

We now will examine the instances of conduct that defendants contend the trial court incorrectly ruled were protected.[6]

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[5] August asserts defendants waived any error regarding the determination of protected versus unprotected conduct, because defendants submitted a jury instruction listing both protected and unprotected conduct, substantially similar to that given by the trial court. August's assertion has no merit. Defendants submitted the jury instruction after the court determined which conduct was protected and unprotected, and in response to the court's request for a proposed instruction incorporating its ruling.

[6] The trial court instructed the jury on which conduct it found to be constitutionally protected, as follows: "*One*, his letter to the editor of The Valley Pioneer in 1973; *two*, his private or public criticisms of James Cozens between 1973 and 1975; [*three*,] the perception by defendants, if any, that he encouraged the student protest in 1974; *four*, his various written and verbal communications with the Superintendent and the Board of Trustees, both public and private, including the occasion following the student time change demonstration; his later defense of the PTA, as well as grievances filed and other communication from Mr. August concerning San Ramon High School; *five*, his recommendations to defendants regarding reassessment of the Boys' P.E. program between 1971 and 1975; *six*, his attempts to persuade James Cozens to alter his decision regarding the streaker, including his meeting with teachers to discuss the same; *seven*, his recommendations for and his conduct of courses in parent and student rights; *eight*, his meetings and discussions with the Green Valley parents; *nine*, his referral to the Principal of four boys who cut P.E. during the spring of—September 1974—that's the physical education teachers' strike, if you find the referral was intended by him as a means of focusing attention on the problem; *ten*, his letter to The Wolfprint in 1974; *11*, his public and private advocacy, orally or verbally, of the rights of students and parents within the educational system between 1970 and '75; *12*, newspaper

II. Protected Conduct

A. August's Relations with the Principal

The first area that defendants dispute was protected conduct, was August's relationship with Cozens. This area encompasses two of the trial court's findings—August's criticism of Cozens between 1973 and 1975, and August's attempts to persuade Cozens to alter his decision regarding the streaker.

Defendants contend August's charge that Cozens was incompetent, was made in response to August's own negative performance evaluations. Defendants argue the "personality dispute" between August and Cozens was not a matter of public concern. Defendants point out, one court has held complaints regarding a negative personnel evaluation from a superior is not protected speech. (*Day v. South Park Independent School Dist.* (5th Cir. 1985) 768 F.2d 696, 701; see also *Alinovi v. Worcester School Committee* (1st Cir. 1985) 777 F.2d 776, 786-787 [resolution of problem between teacher and employer not a matter of public concern].)

Viewed in isolation, August's criticism of Cozens is troubling. However, when evaluated in light of the surrounding circumstances, one could conclude August was not acting solely in response to his personal problems with Cozens, but that he was also concerned about conditions at the school.

At trial, August presented a picture of a school beset with problems and lacking leadership. It was undisputed that the school suffered from a deteriorating physical plant. Several witnesses commented on the low morale of the staff and students. If August's speech "touched upon a matter of public concern," the court must proceed to the *Pickering* balance, even if there was some personal motivation behind the speech. (*Connick v. Myers, supra*, 461 U.S. at p. 149; *Johnson v. Lincoln Univ. of Com., supra*, 776 F.2d at p. 451.) Given the context of August's comments, one must conclude Cozens' competency was a matter of public concern. (See *Trotman v. Board of Trustees of Lincoln*

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articles quoting him and published in the community." (Emphasis added.)

University (3rd Cir. 1980) 635 F.2d 216, 225 [criticism of university president's policies and methods protected by 1st Amendment].)

Defendants insist that even if the dispute between August and Cozens was a matter of public concern, the *Pickering* balance dictates that such conduct was not protected. For this proposition, defendants rely on what they perceive as the destruction of the working relationship between August and Cozens. Several cases, including *Connick*, have found attacks upon an immediate supervisor so damaging to harmonious working relationships, as to be unworthy of constitutional protection. (In addition to *Connick*, see *Shimoyama v. Board of Education, supra*, 120 Cal.App.3d 517; *Sprague v. Fitzpatrick* (3rd Cir. 1976) 546 F.2d 560; *Roseman v. Indiana Univ. of Pennsylvania, at Indiana* (3rd Cir. 1975) 520 F.2d 1364.)

August's criticism had to affect the relationship between August and Cozens. Cozens stated August's comments upset him; however, he also stated that in the best interest of the school, he continued to maintain a professional relationship with August. There is no evidence that August's comments impeded his ability to perform his own duties. Further, at least initially, August's comments were made in private.[7] (Compare *Shimoyama v. Board of Education, supra*, 120 Cal.App.3d 517 [high school teacher/coach sent letter containing direct and implicit attacks on principal to superintendent, head of athletic booster club, and school's faculty representative].) And, once again, one must consider the context in which the criticism took place. While we easily understand defendants' concern with August's criticism of his superior, we cannot find fault with the trial court's striking of the *Pickering* balance in favor of August's free speech interest.

The streaker incident generated much interest on campus and in the community, because of both the novelty of the act and the subsequent punishment of the student. The debate over the proper punishment for the act was not confined to Cozens and

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[7] The private expression of one's views is protected by the First Amendment. (*Givhan v. Western Line Consol. School Dist., supra*, 439 U.S. at p. 413.)

August. Although not a particularly earthshaking controversy, the interest in the matter can be translated into public concern.

Notwithstanding the public concern, defendants assert August's continued resistance after Cozens' final decision is not worthy of First Amendment protection. They contend August violated his duty of loyalty, and that discussion was no longer appropriate after Cozens' final decision. Defendants cite the following comment from *Roberts v. Van Buren Public Schools, supra*, 773 F.2d 949: "... a government as an employer has a legitimate interest in achieving compliance with decisions that, while once open to dispute and discussion, have been made through proper channels." (*Id.* at p. 956.)

Although August exercised poor judgment in this matter, his continued agitation for the reinstatement of the scholarship nomination appeared to reflect a genuine feeling of injustice and a concern for the student's welfare. While August probably exceeded the bounds of reasonable dissent, neither the controversy itself was, nor August's actions were, serious enough to warrant a finding that his conduct was unprotected. The trial court's ruling that August's attempts to persuade Cozens to alter his decision regarding the streaker were protected, will be upheld.

B. August's Relations with the Boys' P.E. Department

The next area in which defendants feel the trial court erred in ruling protected, was August's relations with the Boys' P.E. Department. Three of the instances of conduct found protected by the court dealt with August's relations with the P.E. department—August's recommendations regarding reassessment of the P.E. program; his *referral* of of four students to Cozens during the P.E. strike;[8] and, his filing of grievances.

Defendants argue the "personality dispute" between August and the P.E. staff was not a matter of public concern. That is a reasonable position. But August's attempt to make problems within the P.E. department known, and his attempts to correct

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[8] The trial court ruled August's *refusal to discipline* the students to be unprotected conduct. The trial court also instructed the jury that August's "relations with staff" was unprotected conduct.

those problems were a matter of public concern. It should be noted that August received a request from the student government to look into practices within the department.

Cases cited by August support his position that criticisms of school policies and procedures that affect students are matters of public concern. (See *Bowman v. Pulaski County Special School Dist.* (8th Cir. 1983) 723 F.2d 640, 644-645 [imposition of corporal punishment a matter of public concern]; *Loya v. Desert Sands Unified School Dist.* (9th Cir. 1983) 721 F.2d 279, 281-282 [whether school meeting needs of Mexican-American students a matter of public concern]; *McGee v. South Pemiscot School Dist. R-V* (8th Cir. 1983) 712 F.2d 339, 342 [decision to drop junior high track program a matter of public concern].)[9]

The cases relied on by defendants do not hold to the contrary. (See *Derrickson v. Board of Educ. of City of St. Louis* (8th Cir. 1984) 738 F.2d 351; *Chitwood v. Feaster* (4th Cir. 1972) 468 F.2d 359.) However, defendants argue August's conduct fails the *Pickering* balance test, as did the conduct at issue in *Derrickson* and *Chitwood*, because of its impact on working relationships.

Calling August's interaction with the Boys' P.E. Department a "working relationship" would be a gross misstatement. The record discloses not a single member of the P.E. department who wished to work with August. The failure of August to get along with members of the P.E. department would be unprotected conduct pursuant to the trial court's finding that August's "relations with

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[9] A troubling aspect of the case before us is that August did not find a single problem and then try to find a solution, as in the cases he cites. August seemingly found fault everywhere. Further, he apparently believed only he had the right answers. However, as discussed in section III of this opinion, *infra*, the ultimate review of August's activities is made by the jury. An unfortunate result of 42 United States Code section 1983 as interpreted by the federal courts, is that the jury in a case such as this, is permitted to review decisions of the school board and administration with the benefit of hindsight and with none of the responsibilities—practical, economic, or political—of trying to operate a school district comprised of hundreds of employees and thousands of students.

staff" were unprotected conduct. However, as in the case of August's relationship with Cozens, the trial court again refused to let this factor override August's right to expose what he considered to be problems in the P.E. program.

There is no evidence the problems between August and the P.E. staff significantly interfered with instruction. August's relations with the P.E. staff were not nearly as critical to the functioning of the school as his relations with Cozens. Though the parties dispute whether August's reponsibilities encompassed such a task, August's recommendations for improvements in the P.E. program appear well conceived and not overly critical. Responsibility for the fracture in relations appears to lie as much with the P.E. staff as with August. It is interesting to note that some of his recommendations were eventually adopted, and in 1975, an outside consultant was called in to review the P.E. program at San Ramon High. Clearly, the P.E. program had some problems.

In *Bowman v. Pulaski County Special School Dist., supra,* 723 F.2d 640, two assistant high school football coaches complained that an instance of corporal punishment imposed by the head football coach was improper. The head coach refused to work with the two assistants, and they were transferred to other schools. Notwithstanding, the disruption of the work relationship, the appellate court found the assistant coaches' speech protected, and ordered them restored to their original positions. (*Id.* at p. 645.) "In our mind the public's need to know whether children are being mistreated in school outweighs the other legitimate concerns of the government." (*Ibid.*)

The trial court ruled that August's right to expose problems with the Boys' P.E. program at San Ramon High School outweighed defendants' interest in having cordial relations between the Dean of Boys and the P.E. staff. Given the unusual circumstances of this case, the ruling of the trial court will be upheld.

C. August's Advocacy of Student and Parent Rights

The last area of conduct defendants claim was unprotected were instances where August spoke out on student and parent rights. This includes four instances of protected activity identified

by the trial court: 1) August's perceived encouragement of the student demonstration; 2) his meetings with parents of students from Green Valley School; 3) his letter to the school newspaper regarding harassment of freshmen students at an assembly; and, 4) generally, his public and private advocacy of the rights of students and parents from 1970 to 1975.

Defendants attack August's educational philosophy. They assert August's stance on his reponsibilities created problems and does not deserve First Amendment protection. Defendants belief that the school district had a right to define August's role as Dean of Boys is tenable. (See *Hetrick v. Martin* (6th Cir. 1973) 480 F.2d 705, 709; *Clark v. Holmes* (7th Cir. 1972) 474 F.2d 928, 931.) However as August points out, defendants' argument fails to accurately disinguish protected conduct from unprotected conduct.

It is apparent that August let his concern for the welfare of the students get out of hand at times. The trial court's designation of unprotected conduct acknowledged this. Among the instances of unprotected conduct, as found by the trial court, were August's "failure or refusal to follow directions from the Principal," and the incidents involving teachers Kathryn Tann and Dan Stevens. Thus, it was left to the jury, as part of the causation inquiry, to decide if August's perception of his job functions led to insubordination, and was cause for discipline.

All four instances of protected conduct set out above arose out of matters of public concern. The student demonstration followed a change in school hours, made in response to the change in Daylight Savings Time during the 1973-1974 energy crisis. The Green Valley School parents were holding meetings to discuss problems at their school. One parent heard August speak on student and parent rights, and invited him to speak to the group. The letter to the school newspaper, the Wolfprint, represented a public apology for student misbehavior. As demonstrated by the interest of the local press and some parents, the general issue of student and parent rights was of interest to members of the community, and provoked reactions both pro and con.

These instances of conduct had little direct impact on the day-to-day operation of the school. (See *Pickering v. Board of Education, supra*, 391 U.S. at pp. 569-570.) As far as Cozens knew, August followed his directions to escort the students and insure their safety at the demonstration. At the meetings with the Green Valley parents, matters unrelated to San Ramon High School were discussed. According to August and the parent who arranged his attendance, the principal of Green Valley School was contacted and invited to attend the meetings. At the time the Wolfprint letter was published, Cozens felt it was "appropriate."

It appears the persons most disturbed by these instances of conduct, and by August's advocacy of student and parent rights, were the school board members and the superintendent. Unlike August's criticism of Cozens and the P.E. department, there is no evidence these instances of conduct, by themselves, disrupted working relationships at San Ramon High School. (*Ibid.*) At trial, defendants introduced evidence that some teachers refused to send students to August for discipline. However, defendants were not able to show the refusal to refer students to August directly resulted from his public statements on student rights. The unsupported allegation that August was seen "laughing and joking" with the students at the demonstration, was not supported by credible evidence.

The trial court correctly ruled these instances of conduct were protected.

III. Causation

Having concluded the trial court correctly established which instances of August's conduct were protected, we reach the causation steps of the constitutional analysis.[10] Defendants im-

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[10] Instances of unprotected conduct have been mentioned previously in this memorandum. The complete list of unprotected conduct, as stated by the trial court, reads: "*One*, relations with staff; *two*, failure or refusal to follow directives from the Principal; *three*, the March 1972 evaluation; *four*, the Tann incident; *five*, refusal to discipline four students cutting P.E. classes; *six*, the Stevens' incident; *seven*, refusal to submit Stull 1974 Objectives to the Principal when ordered to do so; *eight*, the revised policy on student discipline and circumstances related

plicitly concede August demonstrated that protected conduct was a substantial factor in the decision to reassign him. (*Mt. Healthy City Board of Ed. v. Doyle, supra*, 429 U.S. at p. 287.) But, defendants strenuously argue that they have shown August would have been reassigned even in absence of the protected conduct. (*Ibid.*) Though this is generally a factual question (*Givhan v. Western Line Consol. School Dist., supra*, 439 U.S. at p. 417), defendants insist the unprotected conduct, particularly August's insubordination and poor relations with the staff, were sufficient to justify August's reassignment, as a matter of law.

We are close to agreeing with defendants. Still, countering the strong evidence of August's insubordination and poor relations, is evidence that August's reassignment originated with the superintendent and the board members, in response to August's public statements on problems within the district.

Testimony from some of the board members indicated that they were uncomfortable with August's letters to the local newspapers and his statement to the press. The former president of the P.T.A. testified that Petersdorf, at a meeting with P.T.A. members, stated August was reassigned because he was outspoken and caused problems. James Solberg, Petersdorf's assistant, stated in a February 14, 1975, memorandum to Petersdorf: "There are probably a number of reasons we might reassign Boyer (August?) that are not related to Jim Cozens' memo to Boyer of 10-30-74. These might include his handling of student concerns regarding the time change, his involvement with the Green Valley parents, his insistence on having a locker in the Men's P.E. office despite lack of space, his advocacy in the Wolfprint of a student walkout at an assembly, his public utterances on such matters as the Community Center, where is is perceived as a spokesman for the administration and his generalized inability to work effectively with, aside from his inability to lead, the Men's P.E. Department."

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thereto; *nine*, the petition signed by the staff members supporting August's reassignment." (Emphasis added.) The court also ruled the 1971 Christmas clemency incident unprotected.

August also points to an earlier memorandum from Solberg to Cozens, dated February 4, 1975. In that memorandum, Solberg supplied Cozens with a draft memorandum for Cozens' use, regarding Cozens' recommended reassignment of August. Cozens used the draft, verbatim, in a return memorandum to Solberg dated February 5, 1975.

In sum, the jury was presented with a very difficult factual question. Defendants made a strong showing that they would have reassigned August solely on the basis of his unprotected conduct. As defendants note, the fact August had no tenure in his administrative position is a factor that weighs in their favor. (See *Harden v. Adams* (11th Cir. 1985) 760 F.2d 1158, 1165.) Nevertheless, because substantial evidence exists to support the jury's implicit finding that defendants would not have reassigned August absent the protected conduct, that finding must be accepted. "If substantial evidence supports the verdict—that is, if reasonable and fair-minded jurors in the exercise of impartial judgment could reach differing conclusions from the evidence—we defer to the jury as fact-finder. [Citation.]" (*Solis v. Rio Grande City Independent School* (5th Cir. 1984) 734 F.2d 243, 247.)

IV. Damages

Defendants challenge the amount of damages awarded to August on three separate grounds. First, defendants contend damages awarded for emotional distress are not supported by substantial evidence.

The jury awarded August damages in the sum of $316,000. August asked for damages for lost pay up to the time of trial, interest, loss of future earnings, and emotional distress. The parties did not ask the jury to segregate the components of the damage award, which makes it difficult to review defendants' contentions. For purposes of their argument, defendants have estimated the amount awarded for emotional distress at $154,000; based on the total award ($316,000), less the amounts claimed for lost pay ($58,539), interest ($23,708) and loss of future earnings ($79,650).

"A court's refusal to grant a new trial on the grounds of inadequate or excessive damages is a matter within the sound

discretion of the district court. It should be overturned only in exceptional circumstances. [Citation.]" (*Sykes v. McDowell* (11th Cir. 1986) 786 F.2d 1098, 1105.) "In determining whether an award is excessive, we are to accord substantial deference to the decision of the jury and will not disturb an award unless we are convinced that it is 'monstrously excessive' or 'so large as to shock the conscience of the court.' [Citations.]" (*Mary Beth G. v. City of Chicago* (7th Cir. 1983) 723 F.2d 1263, 1275.)

The only evidence August presented relating to his emotional distress, was his own testimony. August testified regarding his depression, his isolation at this new school, his family being laughed at in the community, the interruption of his studies toward a doctoral degree, and the rejections he received when he applied for other jobs within and outside the district.

Defendants point out that August never claimed to have contacted a psychologist or counselor. Defendants argue August's demotion was a minor setback, and his claimed depression trivial and passing. Defendants rely on cases in which plaintiff's testimony, standing alone, was held not sufficient to support an award of damages for emotional distress. (*Nekolny v. Painter* (7th Cir. 1981) 653 F.2d 1164, 1172-1173; *Stolberg v. Members of Bd. of Tr. for State Col. of Conn.* (2nd Cir. 1973) 474 F.2d 485, 488-489.)

There appears to be no prohibition against awarding damages for emotional distress, in a section 1983 action, on the basis of the testimony of plaintiff alone. The 7th Circuit Court of Appeals, in a decision subsequent to *Nekolny,* observed that it did not mean to imply an injured person's testimony, standing alone, was never sufficient to establish damages. (*Rakovich v. Wade* (7th Cir. 1987) 819 F.2d 1393, 1399, fn. 6.) "Rather, under *Nekolny,* when the injured party provides the sole evidence, he must reasonably and sufficiently explain the circumstances of his injury and not resort to mere conclusory statements." (*Ibid.;* See also *Sykes v. McDowell, supra,* 786 F.2d at p. 1005.) Whether plaintiff's testimony will support an award for emotional distress in a particular case appears to depend on the quality of that testimony, and whether defendant presents any evidence to the contrary.

Though not overwhelming, August's testimony is sufficient to support the damage award in this case.

Defendants' second contention, that the emotional distress award is excessive must also be rejected. Though the amount defendants estimate was awarded for emotional distress appears somewhat excessive, the award is not so high as to "shock the conscience of the court," under the liberal test prescribed by the federal courts. (See *Mary Beth G. v. City of Chicago, supra*, 723 F.2d at p. 1275.) Defendants attempt to compare the amount awarded here to other cases (*Wilson v. Taylor* (11th Cir. 1984) 733 F.2d 1539, 1550; *Kerr v. Quinn* (D.Conn. 1982) 533 F.Supp. 1329, 1332-1333), is fruitless. " 'Comparison of verdicts rendered in different cases is not a satisfactory method for determining excessiveness *vel non* in a particular case and . . . each case must be determined on its own facts.' [Citations.]" (*Sykes v. McDowell, supra*, 786 F.2d at p. 1105.)

Finally, defendants contend the amount awarded August for his loss of future earnings is speculative and fails to acknowledge the duty to mitigate damages. All estimates of future earnings are speculative. August called a "consulting economist" to testify as to his lost future earnings. The economist estimated August's demotion would cost him $4,500 per year, over 17.7 years ($79,650). Defendants presented no evidence to the contrary. August testified he had sought other administrative positions, without success. As a result of his demotion, August has lost at least 10 years of administrative experience.

It is impossible to tell from the record, the amount the jury awarded August for his emotional distress or lost future earnings, if anything. Even if defendants assumptions regarding the components of the total damage award are correct, the trial court acted within the bounds of its discretion when it denied defendants' motion for new trial.

* * *

The judgment is affirmed.

Holmdahl, J.

WE CONCUR:

Newson, J.

Stein, J.